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NO. 88-837

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

HERMAN T. MULVEHILL,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

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ATTORNEYS FOR APPELLEE

ADDRESS OF COUNSEL:

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QUESTIONS PRESENTED

1. Does this Honorable Court have jurisdiction, under Title 28, Section 1257, United States Code, to review a federal constitutional claim by a state convict which is raised for the first time in this Honorable Court?

2. Does this Honorable Court have jurisdiction, under Title 28, Section 1257, United States Code, to review a claim by a state convict, which could have been but was not presented to the highest state court in a manner which permitted that court to review the claim?

3. Does a state common law rule of evidence, which allows proof of a criminal defendant's reputation after such defendant has put his character into issue, violate due process?

THE PARTIES

In the Circuit Court of Blount County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Herman T. Mulvehill, Sr., who is Petitioner herein, as Defendant, Appellant and Petitioner, respectively, and the State of Alabama, who is Respondent herein, as Plaintiff, Appellee, and Respondent, respectively.

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BRIEF AND ARGUMENT IN OPPOSITION
TO THE PETITION

OPINIONS BELOW

The Alabama Appellate courts issued no opinions in the Petitioner's cases. The Courts' orders affirming the convictions, denying rehearing and denying certiorari are or will be reported in tables as follows:

Mulvehill v. State, 531 So.2d 69 (Ala. Crim. App, 1988)

Ex parte Mulvehill, __ So.2d __ (Ala, Sept. 23, 1988)

JURISDICTION

The petitioner has invoked this Honorable Court's jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is making an alleged claim under the Fourteenth Amendment to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

No statutory provisions are involved in this cause.

STATEMENT OF THE CASE AND FACTS

The Petitioner, Herman Travis Mulvehill, Sr., was indicted for two separate instances of theft of property in the first degree[1] by the grand jury of Blount County, Alabama, at its April, 1982, term. (R.pp.Cr.15-16) On September 9, 1982, the Petitioner was arraigned on the indictment and pleaded not guilty. (R.p.Cr.4)

Numerous motions were filed and ruled on prior to trial. (R.pp.Cr.4-9)

On May 21, 1984, the cause came on for trial before Honorable H. E. Holladay, a Circuit Judge, and a jury. The Petitioner was attended by his attorney, Honorable Charles Howard, Jr., and the State was represented by its District Attorney, Honorable Fitzhugh A. Burttram, and Honorable Robert Morrow, Special Prosecutor. (R.p.1)

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1. Section 13A-8-3, Code of Alabama, 1975.

After the State rested, the Petitioner testified in his own behalf. (Tr.pp.942-1088)

In rebuttal, the State attempted to prove the Petitioner's reputation for truth and veracity. However, the Prosecutor was not able to lay a predicate acceptable to the Honorable trial judge, and the evidence could not be introduced. (Tr.pp.1089-1101)

On May 30, 1984, the jury returned a verdict finding the Petitioner guilty as charged. (R.pp.Cr.1 and 9-10)

The Petitioner was adjudged guilty in accordance with the verdict on may 30, 1984, and on July 3, 1984, the Petitioner was sentenced to fifteen years imprisonment.[2] (R.pp.Cr.1-2 and 10)

The Petitioner moved for a new trial on July 10, 1984, but the same was overruled on September 4, 1984. (R.pp.Cr.12-14)

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2. Sections 13A-5-6(a)(2) and 13A-8-3(c), Code of Alabama 1975.

Appeal was taken to the Court of Criminal Appeals of Alabama. (R.p.Cr.14)

The cause was submitted to the Court of Criminal Appeals on, to wit, May 21, 1985. The Petitioner claimed and argued over one hundred alleged reversible errors on the part of the Learned Trial Judge. However, on April 12, 1988, the Court of Criminal Appeals of Alabama affirmed the conviction without opinion. Mulvehill v. State, 531 So.2d 69 (Ala. Crim. App, 1988)

Review of the decisions of the Court of Criminal Appeals of Alabama by the Alabama Supreme Court is by writ of certiorari. On certiorari, the Alabama Supreme Court is bound by the findings of fact made by the Court of Criminal Appeals, unless the Petitioner requested the finding of additional facts, under Rule 39(k) A.R.A.P, appendix, incident to his application for rehearing. Obviously, if the affirmance was without opinion, there is nothing for the Alabama Supreme Court to review, unless the Petitioner requests the

finding of additional facts. Ex parte Hoffman, 493 So.2d 387 (Ala, 1986); Ex parte Grear, 484 So.2d 381, 382 (Ala, 1986)

On April 26, 1988, the Petitioner applied for rehearing in the Court of Criminal Appeals. He did not, however, request the finding of additional facts as provided for by Rule 39(k) A.R.A.P, appendix.[3]

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3. In the Respondent State's initial reply brief in opposition to the writ in the Alabama Supreme Court, the following observation was made:

> "...Appended to the front of the clear plastic cover of the Application/Brief was a piece of yellow "Post-it" paper on which was handwritten:
>
> '...39(k) handwritten by attorney on original copy of application for rehearing....'
>
> The undersigned, even after inquiry of the Honorable Clerk of the Court of Criminal Appeals, have no idea to what the recitations of this "Post-it" paper refers. However, the Appellant apparently did not request the Court of Criminal Appeals to make specific findings of fact relating to the particular issues of the case, incident to his application for rehearing...." (Respondent's Initial Reply Brief, pages 4-5)

On May 10, 1988, the Court of Criminal Appeals overruled the Petitioner's application without opinion. Mulvehill v. State, above.

On May 28, 1988, the Petitioner petitioned the Alabama Supreme Court for a writ of certiorari to review the action of the Court of Criminal Appeals. The Petitioner raised over one hundred alleged grounds for the writ, including the claim raised in this Honorable Court. However, this claim was argued only generally without reference to the State or Federal Constitution or due process and without citation of authority of any sort.[4]

---

4. A review of the tables of authorities in the Petitioner's several briefs in the State Appellate Courts reveals no reference to the Constitution or any federal statute, treaty, law, rule, or regulation and only one reference to a federal judicial opinion. In its initial reply brief in the Alabama Supreme Court, the State criticized the Petitioner for his raising a plethora of alleged claims and, incident thereto, quoted from Jones v. Barnes (463 U.S. 745, 753, 77 L.Ed.2d 987, 994, 103 S.Ct. 2208 [1983]). In his reply brief the Petitioner mentioned Jones in an effort to distinguish it.

In response to the petition the State filed an initial reply brief under Rule 39(f) A.R.A.P, appendix, pointing out that, since the Petitioner had not requested the finding of additional facts incident to his application for rehearing in the Court of Appeals, there were no facts on which to base certiorari review. Ex parte Hoffman, 493 So.2d 387 (Ala, 1986), above; Ex parte Grear, 484 So.2d 381, 382 (Ala, 1986), above. The State also pointed out that the petition was insufficient in form to meet the Alabama Supreme Court's jurisdictional requirements under Rule 39(c)(4) A.R.A.P, appendix.

On September 23, 1988, the Alabama Supreme Court denied the writ, without opinion. Ex parte Mulvehill, ___ So.2d ___ (Ala, Sept. 23, 1988)

ARGUMENT

We see no point in burdening this Honorable Court with extended argument on obvious points.

The Alabama Supreme Court was given no opportunity to consider the due process claim which the Petitioner seeks to raise here. Therefore, cetiorari, under 28 U.S.C. 1257, does not lie to review it. Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981); Rotary International v. Rotary Club, 481 U.S. ___, 95 L.Ed.2d 474, 487, 107 S.Ct. 1940, 1948 (1987).

The Petitioner made little effort to comply with the requirements of Rule 39 A.R.A.P, appendix. He presented to the Alabama Supreme Court a claim with no facts to support it and utterly failed to comply with Rule 39(c), A.R.A.P. The Alabama Supreme Court would have had no jurisdiction to review the claim the Petitioner raises here, even if he had argued due process. Therefore, the

claim was not presented to the State Supreme Court and certiorari, under 28 U.S.C. 1257, does not lie to review it. Cardinal v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969)

Under the plain words of 28 U.S.C. §1257(3), the State Supreme Court must have had the opportunity to address the federal question on which review is sought here. Where, as here, a state supreme court does not address such an issue, it is presumed that the issue was not properly before that Court. Rotary International v. Rotary Club, 481 U.S. ___, 95 L.Ed.2d 474, 487, 107 S.Ct. 1940, 1948 (1987); Exxon Corp. v. Eagerton, note 3, 462 U.S. 176, 181, 76 L.Ed.2d 497, 504, 103 S.Ct. 2296 (1983); Hanson v. Denckla, 357 U.S. 235, 244, 2 L.Ed.2d 1283, 1292, 78 S.Ct. 1228 (1958). Slagle v. Ohio, 366 U.S. 259, 264, 6 L.Ed.2d 277, 281, 81 S.Ct. 1076 (1961). However, no such presumption is necessary here, since the Petitioner made no pretense of

presenting a federal claim in state court and hardly a pretence of complying with the Rules of Appellate Procedure.

Addressing the merits briefly, it is obvious that the Petitioner is arguing common evidentiary law based on the assumption that the accused has not put his character into issue. Here, by testifying the Petitioner put his character into issue, and rendered evidence of his reputation relevant and admissible, under both Alabama and federal law. E.g. Anderson v. State, 44 Ala. App. 388, 210 So.2d 436 (1968). Compare Rules 404, 607 and 608, Federal Rules of Evidence. If any error occurred here it was not in the State's offering the evidence but in the Trial Judge's sustaining the defense objections to it.

CONCLUSION

In conclusion, the Respondent respectfully submits that the claim the Petitioner seeks to raise is not properly before the Court and is, in any event, a claim with no basis in fact or law.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY:

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APPENDIX

RELEVANT ALABAMA COURT RULES

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 39. REVIEW OF DECISIONS OF COURTS OF APPEALS

(a) Method. Decisions of the courts of appeals may be reviewed by the supreme court upon petition for writ of certiorari only after the court of appeals has overruled an application for rehearing on the point, issue,or decision complained of, except that, in the case of a pre-trial appeal by the state in a criminal case, either party may petition for writ of certiorari without having first applied for a rehearing in the court of criminal appeals. Payment of the amount prescribed in Rule 35A(3) shall be made to the clerk of the supreme court at the time the petition for writ of certiorari is filed.

(b) Time. The petition for writ of certiorari, with an accompanying brief, shall

be filed with the clerk of the supreme court pursuant to Rule 25(a), within 14 days (2 weeks) after the decision of court of appeals on the application for rehearing, except that in the case of a pre-trial appeal by the state in a criminal case, a petition for writ of certiorari must be filed within 7 days (1 week) of the judgment of the court of criminal appeals or within 7 days (1 week) of that court's order overruling an application for rehearing.

(c) Grounds. The petition for writ of certiorari to this court in a criminal case in which the death penalty was imposed as punishment shall be filed by counsel representing the petitioner on the appeal of the case, and will be granted as a matter of right. Unless counsel who represented the appellant on the original appeal has been replaced by new or additional counsel, he shall prepare the petition for the writ of certiorari and file the same in accordance

with these rules. If new or different counsel has been appointed to represent the appellant, it shall be his duty to prepare the petition for writ of certiorari and file the same in accordance with these rules. In all other cases, civil or criminal, petitions for writs of certiorari will be considered only:

(1) From decisions initially holding valid or invalid a city ordinance, a state statute or a federal statute or treaty, or initially construing a controlling provision of the Alabama or Federal Constitution;

(2) From decisions that affect a class of constitutional, state, or county officers;

(3) From decisions where a material question requiring decision is one of first impression in Alabama;

(4) From decisions in conflict with prior decisions of the Supreme Court or the courts of appeal; provided that when (4) is the basis of the petition, it must quote that part of the opinion of the appropriate court

of appeals, and that part of the prior decision of the Supreme Court with which the conflict is alleged; or if the conflict is with a prior decision of the court of appeals, the conflicting passages must be quoted; or it shall state specifically and with particularity wherein such decision is in conflict; and,

(5) Where petitioner seeks to have controlling Supreme Court cases overruled which were followed in the decision of the court of appeals.

(d) Form of Petition. The petition shall be on legal-size paper and shall contain:

(1) The style of the case (the same as in the court of appeals), the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and the date of the order overruling the application for rehearing;

(3) A concise statement of the grounds, (c)(1)-(5), supra, on which the petition is based; and,

(4) A copy of the opinion of the court of appeals shall be attached to the petition as an exhibit.

(e) Service. Nine copies of the petition and briefs shall be filed with the clerk of the Supreme Court, one copy with the clerk of the appropriate court of appeals, and one copy shall be served on each party to the proceeding in the court of appeals including those not joining in the petition.

(f) Briefs. Petitioner's brief shall be on the same size paper and bound as briefs for appeals and shall accompany the petition for writ of certiorari. No more briefs will be required of petitioner, although he may file an answering brief within 14 days (2 weeks) --or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after receipt of respondent's

brief. Within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case within 7 days (1 week)--after service of the petition and brief by petitioner, the respondent may file an initial brief limited solely to the issue of whether or not any of the grounds set forth in (c) (1)-(5) authorize the granting of a writ. Thereafter, if the writ should be granted, the respondent may file a subsequent reply brief addressed to the substantive issues presented for review on the petition for writ of certiorari, within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after notice that the writ has been granted. Nine copies of the reply brief shall be filed with the clerk of the supreme court and one copy shall be served on the petitioner or his attorney. No more shall be required of respondent.

The work "brief" as used in this rule includes an appendix where brief and appendix

were employed by the party in the court of appeals.

(g) Action on Petition. If the court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue, it shall be so ordered, of which due notice shall be given by the clerk to the parties or their counsel, and the clerk of the appropriate court of appeals. The record, one copy of the briefs,and appendices, if any, shall be transmitted to the clerk of the Supreme Court. The case shall stand for submission as herein provided.

(h) Oral Argument. There will be no oral argument on preliminary examination. In the event the writ is granted, oral argument may be requested in writing by either party within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after receiving notice of the granting of the writ. A copy of

the request shall be served on the adverse party.

(i) Submission. If either party shall have made known a desire for oral argument, the clerk of the supreme court shall endorse that fact on the proper docket and, if oral argument is not determined under the criteria of Rule 34 to be unnecessary, shall set the case down for oral argument not less than 14 days (two weeks) after notifying the parties, or their attorneys or record, in writing of such setting. If neither party shall have requested oral argument,as herein provided, or if the supreme court shall have determined oral argument to be unnecessary, the clerk of the Supreme Court shall, when briefs from all parties have been filed with him as herein provided, immediately submit the case upon the record, briefs, and appendices, if any.

(j) Rehearing. No application for rehearing shall be received in the Supreme Court if the petition for certiorari is denied.

(k) Scope of Review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to this request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.

The application of the law to the stated facts is included in the scope of review.

In all cases in which the death penalty has been imposed, upon review of the opinion of the Court of Criminal Appeals on certiorari, the Supreme Court may notice any plain error of defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of petitioner.

RULE 40. APPLICATIONS FOR REHEARING

The application for rehearing may be made separately or may be included at the beginning of applicant's brief. All applications for rehearing, and the briefs supporting same, must be filed with the clerk of the court within 14 days (2 weeks) after the rendition of the judgment, except that in case of a pre-trial appeal by the state in a

criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within 7 days (1 week)after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief opposing the application is required, but a brief from the opposing party may be filed within 14 days (2 weeks)--or, in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)--after the filing of the original application and brief. No second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this _____ day of December, 1988, I did serve the requisite number of copies of the foregoing on the Attorneys for Herman T. Mulvehill, Sr., Petitioner, by mailing the same to said Attorneys, first class postage prepaid and addressed as follows:

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